SUPREME COURT, U.S.
FILED
DEC 16 1974
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1975

No. 74-7551

PETER CARVER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

GILBERT K. DAVIS
Attorney for Petitioner
Penthouse, Mosby Building
10560 Main Street
Fairfax, Virginia 22030

(7566)
LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 | New York, N.Y. (212) 565-6377 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (202) 783-7288

TABLE OF CONTENTS

Page

Citation to Opinion Below 2

Jurisdiction 2

Question Presented 3

Constitutional Provisions, Statutes and Rules of Court Involved 4

Statement of the Case 7

Statement of Facts 8

Reasons for Granting the Writ 18

Conclusion 22

Certificate of Service 23

TABLE OF CITATIONS

Cases Cited:

Andrews v. United States, 403 F.2d 341 (9 Cir. 1968) 21

Ashby v. Cox, 344 F. Supp. 759 (W.D. Va. 1972) 21

Brooks v. Texas, 381 F.2d 619 (5 Cir. 1967) 21

Contents

Page

Hintz v. Beto, 379 F.2d 937 (5 Cir. 1967) 21

In re Hwamei, 37 Cal. App. 3d 554, 112 Cal. Reptr. 464 (1974) 21

Owsley v. Peyton, 368 F.2d 1003 (4 Cir. 1963) 21

Statutes Cited:

18 U.S.C.:

Section 1341 7

Section 1343 7

Section 4244 ..... 4, 20

United States Constitution Cited:

Fifth Amendment 5, 19

Sixth Amendment 6, 19, 20

Rules Cited:

Federal Rules of Criminal Procedure:

Rule 32 ..... 3, 18, 19, 22

Rule 32(d) 6, 7

Contents

Other Authority Cited: *Page*

A.B.A. Standards Relating to Pleas of Guilty (Draft 1968) 19

APPENDIX

Appendix A Order of the United States District Court for the Eastern District of Virginia 1a

Appendix B Motion to Set Aside Guilty Plea 3a

Appendix C Order of the United States Court of Appeals for the Fourth Circuit 6a

In The

Supreme Court of the United States

October Term, 1975

No.

PETER CARVER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Peter Carver prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on October 18, 1974.

CITATION TO OPINION BELOW

A copy of the opinion of the United States Court of Appeals for the Fourth Circuit affirming the judgment of conviction of the United States District Court for the Eastern District of Virginia is attached to this petition. See Appendix A, *infra*.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was entered on October 18, 1974, and this Court, by order signed by Chief Justice Warren Burger extended the time in which to present this petition to and including December 17, 1974. Therefore, this petition is timely filed pursuant to Rule 22 of the Supreme Court of the United States. The jurisdiction of this Court is involved under 28 U.S.C. Section 1254.

QUESTION PRESENTED

Whether the motion of petitioner, to set aside his guilty plea, should have been granted upon a showing of "manifest injustice" required by Rule 32 of the Federal Rules of Criminal Procedure; the injustice being the facts that petitioner was insane at the time of the commission of the alleged offense, incompetent at the time of entry of the guilty plea, and inadequately represented by counsel.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF COURT INVOLVED

Title 18, United States Code, Section 4244:

> Whenever after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. For the purpose of the examination the court may order the accused committed for such reasonable period as the court may determine to a suitable hospital or other facility to be designated by the court. If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing, upon

due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto. No statement made by the accused in the court of any examination into his sanity or mental competency provided for by this section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding. A finding by the judge that the accused is mentally competent to stand trial shall in no way prejudice the accused in a plea of insanity as a defense to the crime charged; such finding shall not be introduced in evidence on that issue nor otherwise be brought to the notice of the jury.

Amendment Five of the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment Six of the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Rule 32 of Federal Rules of Criminal Procedure – Sentence and Judgment:

> (d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

STATEMENT OF THE CASE

On February 12, 1974, the Grand Jury convened at the Newport News Division of the United States District Court for the Eastern District of Virginia, returned a true bill of indictment against the petitioner Peter Carver, charging him in eight counts of mail and wire fraud in violation of Title 18, United States Code, Sections 1341 and 1343.

On April 3, 1974, petitioner appeared before the Honorable Albert V. Bryan, Jr., with counsel, Albert Grenadier, Esq., and entered a plea of guilty to the third count of the indictment, whereupon the plea was accepted and the remaining counts dismissed on motion of Mr. Justin Williams, Assistant United States Attorney. The matter was referred to the Probation Department for a pre-sentence investigation, and on May 10, 1974, petitioner was sentenced to a term of four years in the penitentiary.

Gilbert K. Davis, Esq., became counsel for appellant and a motion to set aside guilty plea, pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure was made on behalf of appellant. See Appendix B, *infra*. A hearing on this motion was held on July 12, 1974, the Honorable Albert V. Bryan, Jr., presiding. Several witnesses testified at this hearing. The motion was denied and a timely appeal taken from this ruling.

The appeal was argued before the United States Court of Appeals for the Fourth Circuit. See Appendix C, *infra*. On October 18, 1974, the Court of Appeals affirmed the decision of the District Court, and this petition follows.

STATEMENT OF FACTS

The petitioner Peter Carver is one of a very few people in the country with the knowledge and experience to design and construct ice skating rinks (T42).* In his capacity as both a consultant and a contractor, the petitioner often has a large number of projects in several varying stages of completion. As was demonstrated by the testimony of the psychiatrist (T7-8), his former attorney, Mr. Grenadier (T88-89), his secretary, Miss Sulatt (T38-39) and the petitioner himself (T64), the business is nothing short of chaotic. This is due in some part to the nature of the business, but is primarily caused by the distinct characteristics of the petitioner, who was classified by his psychiatrist as an "obsessive, impulsive personality with manic traits" (T8). His habit is to do everything himself and this habit has caused his present problem.

Petitioner was indicted for wilfully defrauding one of his clients, Mrs. Weisegier, by the use of the mails. Specifically, the petitioner was charged with fraudulently obtaining money by making representations to Mrs. Weisegier that he had obtained a metal Butler Building (used to house ice skating rinks) when he had not in fact done so (T69).

Petitioner pleaded guilty to this charge and was sentenced to serve four years in prison.

At the hearing to withdraw his plea, Mr. Carver testified that he was engaged in consultant work for the building of new

* References are to pages of the transcript of the hearing on petitioner's motion to set aside the plea

ice rinks. In September, 1971, he met Mrs. Weisegier who came to his office in New York, and told him that she was planning to build an ice rink in the Northern Virginia area. Mr. Carver was hired to do this project on which he eventually worked harder than any previous project. He came to Virginia over 200 times with travel expenses alone of over $16,000 (T42-45).

During the course of the project, Mr. Carver attempted to obtain a pre-fab structure known as a "Butler Building" for the rink. The Butler Building is the subject of Count III of the indictment to which Carver pled guilty. He received $45,000 from Mrs. Weisegier to pay for the building, of which he paid $15,000 to a person who was supposed to supply it but never did (T77-78). This fact was to be verified by a cancelled check and a letter which was part of the materials the Court refused admission into evidence at the hearing to withdraw the plea. The $30,000 difference was used by Carver for Mrs. Weisegier's rink project, and not for his own personal use (T79).

When Mrs. Weisegier called about the Butler Building, Carver did not have the money to pay her what he owed, having spent the money on other aspects of the project. He admittedly lied to Mrs. Weisegier in order to stall her demand by saying that the building was on a flat car in Poughkeepsie, New York, where he was trying to sell it and would split any profits with her. She checked and discovered the building was not in the railroad yard. Carver then told her that he would look into the matter. Months went by and so long as Mrs. Weisegier was not bothering him about the money he was trying to get things to the point where he could reimburse her. Unfortunately, during this time he was completely out of commission for almost three months due to a heart attack (T69-70).

Defense counsel sought to introduce documents including checks and other business records to show that Carver had actually spent more money on Mrs. Weisegier's rink project that he had obtained from her, that Carver had no wilful scheme to defraud, and that in fact no offense had been committed (thus justifying withdrawal of a plea on the basis that it would be manifestly unjust to sustain a conviction where there was no offense). Judge Bryan refused this evidence, and he also refused the testimony of several witnesses who had been subpoenaed, on the ground that the merits of the case, and the circumstances of the offense, were irrelevant to a determination of whether the plea should be set aside for manifest injustice (T4-5, 39, 45-49, 54, 56-57, 71-72, 81). The Court at one point terminated defense examination with the statement: "If you are going to undertake to show he is innocent of that offense, I am going to cut you off right now" (T39-40).

When the Grand Jury sent a subpoena to Carver, he retained the legal services of Albert Grenadier, Esq. Carver stated that Grenadier sent him a copy of the indictment and he came to Virginia to discuss the case with Mr. Grenadier who told him: "We have an eight count indictment here which means you are facing 40 years in jail if we go to trial, what do you think we should do?" Carver asked Grenadier for his advice. Grenadier told him that he thought the Government could prove Count III because of evidence that Carver lied to Mrs. Weisegier about the building being on the railroad siding, and therefore it would be to Carver's advantage to face just one count instead of 40 years. Carver told Grenadier that he could prove he had put a downpayment on the Butler Building and that during the course of construction the building became obsolete because of zoning

restrictions and they had to go to another building. But Carver said that if the question is whether he received the money from Mrs. Weisegier that he hadn't paid back: "Yes, I received the money," and if receiving the money means guilt, then 'I guess I am guilty'" (T51, 67-68). Grenadier said that since "you received the money, we don't have a great deal to discuss" (T57).

Carver stated that he was not advised by Grenadier of the meaning of the words "wilfulness" and "intent to defraud" and "scheme" and that he did not understand these requirements of proof by the Government at the time he entered his guilty plea (T53-54). Carver testified at the hearing that he had, in fact, no intent to take money from Mrs. Weisegier, or to cheat her in any way, nor was she in fact defrauded (T67-69).

Albert Grenadier, Esq. testified for the Government that he had gone over the indictment with Carver and that he had spent several hours in the prosecutor's office on one occasion examining documents and reading statements of the Government's witnesses (T84). He sent Carver copies of the Government's exhibits (T86). However, he did not interview a single witness, despite the fact that Mrs. Weisegier and her sons all live in the Northern Virginia area, and he never obtained anything, prior to the guilty plea, from Carver's chaotic (Grenadier's term, T88) records, in order to determine how much money had, in fact, been received and spent by Carver in connection with Mrs. Weisegier's rink project (T80-81, 93-94, 97).

Grenadier told Carver that the Government would be unable to prove all of the counts in the indictment, but Grenadier claimed that Carver "admitted his guilt" on the Butler

Building count in that he admitted that Mrs. Weisegier had sent him money and that later he had lied to her about the building being in Poughkeepsie, New York (T86-87). Nevertheless, Mr. Grenadier himself admitted on cross-examination that it would not be a crime to receive money from a person and to owe them the money, nor would it be a crime to lie (T100). Mr. Grenadier further said: "I don't think he [Carver] fully realized the consequences because I think he always felt in his own mind that he could always make it good" (T100). Significantly, Mr. Grenadier originally told Carver that he thought this should have been a civil matter but that it became criminal when the Grand Jury acted (T96).

Mr. Grenadier claimed to have handled many fraud cases — civil and criminal — but he confessed that this case is highly unusual and bizarre, because this is a case, as distinguished from the sale of the Brooklyn Bridge, where the "victim" got what she bargained for. "This case is so bizarre that it doesn't fit the normal pattern of a fraud case. *She [Mrs. Weisegier] probably did get what she was supposed to get, but how she got it is very bizarre*" (T94). (Emphasis added.)

Mr. Grenadier testified that he couldn't "really tell whether it [Carver's behavior] was compulsive or whether it was wilful. I had no way of knowing whether he knew what he was doing, I would have to say . . . that he did know what he was doing. *But whether it was done by compulsion or something he could not control or whether it was done wilfully, I can't give you an honest answer to that because I just don't know*" (T89). Yet Mr. Grenadier advised Carver to enter the guilty plea.

One of the first things that Mr. Grenadier discussed with Carver was the possibility of psychiatric help (T88). Three additional quotes from Grenadier's testimony are pertinent to the psychiatric question:

> "I suggested to him that he consult a psychiatrist and I got the feeling and the impression in discussing it with him that his business affairs were so chaotic that he probably didn't even have time to go see a psychiatrist. I thought there must have been some psychiatric problem, some reason of some description why he was doing what he was doing, because a man who is capable of earning the kind of money Mr. Carver is capable of earning, being honest, I couldn't figure out why he would do all of these other things and I suggested that he consult a psychiatrist or whether he ever considered consulting a psychiatrist, and he said at one point he thought maybe he would, but he never quite got around to it." (T91).

* * *

> "I suggested that he see a psychiatrist because I saw a pattern of behavior in this transaction that was unusual. It is not, as I say, a classic fraud case where somebody said I have this or I have that, or I will produce something than he doesn't produce it. What he was doing was using money that he got from Mrs. Weisegier for other things.

I don't think any of it went in his pocket, but I think he was so involved with so many other things at the time that he needed money for that he was telling her I need the money for a specific thing and he would get the money, and then he would use it for something else [on the rink project]." (T95-96).

* * *

"I don't think that when this transaction commenced that he had any intent to defraud anybody. [Thus no fraud in the inducement as there is in most schemes to defraud]. I think it just happened. [If it just happened, it certainly was not done wilfully or deliberately]. My original question with respect to the psychiatrist was I started off the conversation by asking him [Carver] if he had ever considered consulting a psychiatrist because it appeared from his record that every time he would build an ice skating rink for somebody the same sort of thing would go on. I thought there was something in his behavior pattern that may or maybe psychiatric in nature, and he indicated that he had not consulted a psychiatrist, although he had thought about it" (T99).

It is important to note, with respect to the psychiatric issue discussed by Mr. Grenadier above, that at the time of Carver's guilty plea, Mr. Grenadier assured the Court that "we have

explored every conceivable avenue in this case" (T8, Plea). And yet Mr. Grenadier told Dr. Hamman that he felt that Carver should have seen a psychiatrist (T21-22).

At the conclusion of Mr. Grenadier's cross-examination the Court asked him specific questions as to whether he had explained the requirement of wilfulness to the petitioner and, despite his previous testimony that prior to the guilty plea he couldn't tell whether Carver's behavior was "compulsive" or "wilful," he answered that he had explained this term. When the Court next asked how he had defined the term, Mr. Grenadier said: "Well, I think I put it in layman's terms, that he did it deliberately" (T97-98).

Dr. Wilbur Hamman — whose qualifications as a psychiatrist were not contested by the Government — testified that he had examined the petitioner. Carver had given Dr. Hamman a history including the fact that he had received money from Mrs. Weisegier for the Butler Building (T5-6). He told Hamman that he wasn't exactly sure what happened to the money but that he was quite sure that he had spent it for other things that had to do with the building of the rink for Mrs. Weisegier. Carver told him that he had ended up being the general contractor rather than just the consultant on the case and that he was handling everything, including the subcontracts, the money and supervising the whole job. He stated this was the first time he had done that kind of thing. Formerly he had been merely a consultant. He stated that he had not paid Mrs. Weisegier back money that he had received from her for the Butler Building (T10).

Carver admitted to Dr. Hamman that he had lied to Mrs. Weisegier about the Butler Building being on a railroad car. He stated that he had lied to her because that was the only way he could raise the money to get the money back to her. In other words, he was trying to stall Mrs. Weisegier. Carver told Hamman that he really never intended to cheat anyone out of the money; that he would get involved in these projects and get confused and get over-extended and would end up in situtations where he did owe money. He said that he had admitted his guilt under advice of counsel, who felt that was the best way to handle the case. He said that at no time did he feel that he had taken money from Mrs. Weisegier with the intention of keeping it (T18-19, 26-27).

From his examination of the petitioner, Dr. Hamman concluded that this was "a very obsessive man who had definite manic tendencies." He stated that he could not delegate authority and that he was "systemless as many manics are, who tended to take on more than he could handle, who would lose track of what was going on, who would do everything himself." Dr. Hamman also said that "in my opinion, there was never any intent to defraud people, but that he lost control of the money that he was handling and never kept any records and often didn't know where he was going and in my opinion this was a result of obsessive compulsive disease and manic disease." He stated that further investigation might lead him to diagnose this as a manic type of psychosis. Carver had obsessive tendencies toward procrastination but he also tried to do everything himself, more than the average obsessive and impulsive businessman. Dr. Hamman stated that he would classify Carver's condition as a mental illness (T7-8, 13).

It is significant that the prior criminal record of the petitioner was one of the major reasons for the guilty plea because Mr. Grenadier felt that Carver couldn't take the stand to tell his side and thereby expose himself to impeachment by the prior convictions (T85). The fact that Carver has had difficulties with the law on other occasions concerning bad checks and schemes makes Dr. Hamman's diagnosis more probable because this is the way Carver had been behaving for the past 12 years (T35-36). Dr. Hamman stated that Carver has been a severe obsessive compulsive since 1962 when he first got into legal difficulties (T15). Nevertheless, if Carver had never committed a crime, he would still be diagnosed as a manic depressive and manic impulsive personality (T32).

Dr. Hamman stated that Carver would lose track of what was right and wrong much of the time. When he is operating he would not be able to conform his conduct to the requirements of the law because he was so caught up with what he was doing he didn't think in terms of right and wrong, but he would in essence be forced to do the things that he did. Dr. Hamman stated that Carver had a feeling of being driven to do things, and that he couldn't control himself. Dr. Hamman stated that it was his opinion that this was the situation with respect to the Butler Building. Carver had lost real contact with what was going on and that he really didn't know what was going on a good deal of the time (T11-12).

In Dr. Hamman's opinion, Carver was not able to understand the difference between a wilful planned scheme to defraud and the fact that he had money which was owed to Mrs. Weisegier and that he had been unable to pay back right away

(T34-35). The condition of Carver's mind was that he intended to pay Mrs. Weisegier back, but that he had to get the money together from some other source because he had already used that money for other aspects of the ice skating rink. Dr. Hamman stated that Carver never intended to defraud the lady. He intended to eventually get everything together and settled (T10-11, 36).

Dr. Hamman believes that Carver did not understand the term wilfulness that was required for the offense. He does not believe that he was *able* to think in those terms at the point when he entered the plea (T36).

Dr. Hamman testified that Mr. Carver was *probably not competent to assist in his own defense* on April 3, 1974, when he pled guilty, and therefore the plea was probably not knowingly and understandingly made (T14, 22-23). Moreover, there is a *strong possibility that Carver did not understand what he was doing at the time of his transactions with Mrs. Weisegier* (T15). In Dr. Hamman's view the insanity issue should have been raised when Mr. Grenadier suggested to Carver that he see a psychiatrist; that is: prior to the entry of the guilty plea (T31).

REASONS FOR GRANTING THE WRIT

It is manifestly unjust to refuse to set aside a guilty plea, after sentence, under Rule 32, Fed. R. Crim. P. (1969), when the unrebutted evidence affirmatively demonstrates the petitioner's insanity at the time of the commission of the alleged offense, incompetence at the time of entry of the plea, a strong probability no offense had been committed, and because of inadequate assistance of counsel.

No United States Supreme Court cases have been found which set forth standards for the showing of "manifest injustice" necessary to set aside a plea after sentence. It is appropriate for this Court to establish such standards through the medium of this case.

It is also important that this Court rectify the clear injustice that has prevented petitioner from obtaining his right to a trial by jury.

Guilty pleas are set aside, upon request, almost as a matter of course if the motion to set aside comes prior to sentencing. For obvious reasons, a more difficult hurdle is required to be overcome after sentence is imposed; a defendant should not be permitted to withdraw his plea solely because he is dissatisfied with his sentence. On the other hand, the term "manifest injustice" to set aside a plea seems to be less stringent than the constitutional "due process" considerations which would be the sole test in the absence of Rule 32. We submit that the facts of this case present violations of Fifth Amendment due process, Sixth Amendment adequate counsel, and Rule 32 manifest injustice criteria.

The *A.B.A. Standards Relating to Pleas of Guilty* (approved Draft 1968) lists a number of general areas that constitute manifest injustice. Motions under these areas are deemed timely if "made with due diligence, *considering the nature of the allegations therein*, and not necessarily barred because made subsequent to judgment or sentence." Those listed as constituting manifest injustice to a defendant include:

"(1) he was denied effective assistance of counsel . . .;

(2) the plea was not entered or ratified by the defendant . . . ;

(3) the plea was involuntary, or was entered without knowledge of the charge . . . ;

(4) and (5) he did not receive . . . concessions contemplated . . . ."

The issue here is simply whether petitioner's guilty plea should stand in the face of the following facts:

1. The unrebutted testimony of petitioner's original counsel, and a psychiatrist (who examined petitioner after sentence at the insistence of new counsel) confirmed that petitioner was mentally ill at the time of the alleged offense and that he was incompetent to assist counsel and to enter a plea of guilty, and thereby give up his right to a trial by jury.

2. Original counsel failed to have petitioner examined under Title 18, U.S.C. §4244, even though counsel had doubted that petitioner was mentally competent. See Statement of Facts and T31, 88, 91, 95-96, 99. Title 18, U.S.C. §4244 provides for a hearing on competency *regardless of the defendant's wishes or consent*, whenever there is reason to believe the defendant is incompetent. Counsel's failure to invoke this statute when he knew or strongly suspected that the defendant was mentally incompetent deprived petitioner of his Sixth Amendment right

to the effective assistance of counsel. *In re Hwamei*, 37 Cal. App. 3d 554, 112 Cal. Reptr. 464 (1974); *Brooks v. Texas*, 381 F.2d 619 (5 Cir. 1967); *Hintz v. Beto* 379 F.2d 937 (5 Cir. 1967); *Andrews v. United States*, 403 F.2d 341 (9 Cir. 1968); *Owsley v. Peyton*, 368 F.2d 1003 (4 Cir. 1963); *Ashby v. Cox*, 344 F. Supp. 759 (W.D. Va. 1972).

3. Counsel did not adequately explain to petitioner that the scheme to defraud must be *wilful;* that is: that the Government must prove more than that the petitioner owed the "victim" money and that he had lied to her in order to stall her demands for reimbursement. Therefore, the plea was not "knowingly and intelligently" made.

4. Petitioner entered the plea on advice of counsel who admitted at the hearing that he had not personally investigated and interviewed a single witness, or required the petitioner to produce and organize his business records which would have shown that the "victim" was not defrauded in that she received more money, equipment, and services from the petitioner than she gave to him.

5. There is a strong likelihood that there was no offense of fraud; *i.e.*, despite the obsessive manner in which the defendant conducted his chaotic business, the "victim" did not lose any money and she received the ice rink for which she bargained. This likelihood is postulated by the post conviction testimony of petitioner's original attorney, petitioner himself, and finally by the business records of petitioner which were collected and sorted by new counsel, but which were proffered and excluded from evidence at the hearing to set aside the plea. Petitioner

actually paid out more money for the benefit of the "victim" than he received from her; a fact unknown by petitioner at the time of the plea and only later developed by organizing petitioner's chaotic records after he was sentenced.

A somewhat lengthy brief was submitted to the Fourth Circuit by petitioner on appeal and is contained in the records to be transmitted. Additional legal discussion here is superfluous. The obvious question is whether a conviction based upon the guilty plea of an incompetent defendant, made upon advice of counsel who failed to adequately represent him, should be permitted to stand.

The statement of facts, without argument, demonstrates an unfairness of preserving this plea. If petitioner is not entitled to withdraw his plea, it is difficult to conceive of any other factual situation which would present a stronger case of "manifest injustice," and therefore that term in Rule 32 is without meaning.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorarishould be granted to review the decision of the courts below and to decide the question presented herein.

Respectfully submitted,

s Gilbert K. Davis
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing petition was mailed, postage prepaid, to the Office of the Solicitor General of the United States, and to Justin W. Williams, Assistant United States Attorney for the Eastern District of Virginia, this 16th day of December, 1974.

s/ Gilbert K. Davis

APPENDIX A – ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF VIRGINIA - ALEXANDRIA

United States of America

v.

Peter Carver, a/k/a Harold E. Carver

Defendant.

Docket No. Cr. 50-74-A

In the presence of the attorney for the government the defendant appeared in person on this date, 5/10/74 with counsel Albert H. Grenadier, Esq.

The court has adjudged on 4/3/74, that, the defendant having pleaded guilty, and the court being satisfied that there is a factual basis for the plea, Defendant has been convicted as charged in the indictment of the offense of T. 18 U.S.C. 1341 - Mail Fraud - ct. 3.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the

court adjudged the defendant guilty as charged and convicted and ordered that: the defendant is committed to the custody of the Attorney General or his authorized representative for a period of four (4) years.

On motion of the U.S. Atty. counts 1, 2, 4, 5, 6, 7, & 8 are dismissed.

Commitment Order Dated 5/10/74

Certified as a true copy on this date, 5/10/74.

s/ (illegible)

s/ G.K.B.
U.S. District Judge

s/ W. Farley Powers, Jr.
Clerk

FILED
May 10, 1974
Clerk, U.S. District Court
Alexandria, Virginia

APPENDIX B — MOTION TO SET ASIDE GUILTY PLEA

IN THE

UNITED STATES DISTRICT COURT

FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA

v.

PETER CARVER

Criminal No. 50-74-A

COMES NOW the Defendant, by counsel, and hereby respectfully prays that his guilty plea be set aside pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure; and as reason therefor states as follows:

1. The Defendant believes himself to be innocent of the charges. The defense will produce evidence indicating that the plea was not providentially made by the Defendant, and evidence that tends to indicate the Defendant's innocence of the crimes charged.

Appendix B

2. There may be reason to believe that Defendant was not competent to enter the plea and there may have been a possible defense of insanity.

Since the Defendant believes himself to be innocent and believed at the time of the entry of the plea that he was innocent, it would appear that the Defendant did not make a rational decision regarding the entry of the plea and thereby waiving his rights to trial by jury and other possible defenses. There may also be a question as to whether the Defendant fully understood the consequences of his plea, and to whether the Defendant was correctly advised by counsel with respect to the plea.

WHEREFORE, for the foregoing reasons, and to prevent manifest injustice, Defendant respectfully prays that his plea of guilty be set aside and his case be set for trial.

Respectfully submitted,

s/ Gilbert K. Davis
GILBERT K. DAVIS
Counsel for Defendant

JOSEPH L. DUVALL
Co-Counsel for Defendant

Appendix B

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Notice was mailed, postage prepaid, to Justin W. Williams, Esquire, Assistant United States Attorney, this 1st day of July, 1974.

s/ Gilbert K. Davis
GILBERT K. DAVIS

DUVALL, TATE, BYWATER AND DAVIS, LTD.

s/ Gilbert K. Davis
GILBERT K. DAVIS, ESQUIRE
Penthouse, 10560 Main Street
Fairfax, Virginia 22030
591-4900
Counsel for Defendant

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 74-1844
No. 74-1845

UNITED STATES OF AMERICA,

Appellee,

v.

PETER CARVER,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

(Argued October 4, 1974. Decided October 18, 1974)

Before BUTZNER and RUSSELL, Circuit Judges.

Gilbert K. Davis for appellant; Justin W. Williams, Assistant United States Attorney for the Eastern District of Virginia, (David H. Hopkins, United States Attorney, on brief) for appellee.

Appendix C

PER CURIAM:

Peter Carver appeals from an order of the district court denying him leave to withdraw his plea of guilty to mail fraud after he had been sentenced. Upon consideration of the record, briefs, and oral argument, we find no error.

AFFIRMED.